2003

State of Utah v. Norm Smith : Reply Brief of Petitioner

Utah Supreme Court

IN THE UTAH SUPREME COURT

STATE OF UTAH, **Respondent/Cross-Petitioner,** **vs.** **NORM SMITH,** **Petitioner/Cross-Respondent.**	**Case No. 20030341-SC**

REPLY BRIEF OF CROSS-PETITIONER

ON WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS

JEFFREY S. GRAY (5852)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
UTAH ATTORNEY GENERAL
160 East 300 South, 6th Floor
PO BOX 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

BRIAN G. FILTER
BROCK BELNAP
Washington County Attorney's Office

Counsel for Respondent/Cross-petitioner

MARGARET P. LINDSAY
99 East Center Street
PO BOX 1895
Orem, UT 84059-1895

Counsel for Petitioner/Cross-respondent

IN THE UTAH SUPREME COURT

STATE OF UTAH, **Respondent/Cross-Petitioner,** **vs.** **NORM SMITH,** **Petitioner/Cross-Respondent.**	**Case No. 20030341-SC**

REPLY BRIEF OF CROSS-PETITIONER

ON WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS

JEFFREY S. GRAY (5852)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
UTAH ATTORNEY GENERAL
160 East 300 South, 6th Floor
PO BOX 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

BRIAN G. FILTER
BROCK BELNAP
Washington County Attorney's Office

Counsel for Respondent/Cross-petitioner

MARGARET P. LINDSAY
99 East Center Street
PO BOX 1895
Orem, UT 84059-1895

Counsel for Petitioner/Cross-respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

IN THE UTAH SUPREME COURT

STATE OF UTAH, **Respondent/Cross-Petitioner,** **vs.** **NORM SMITH,** **Petitioner/Cross-Respondent.**	**Case No. 20030341-SC**

REPLY BRIEF OF CROSS-PETITIONER

* * *

Pursuant to rule 24(c), Utah Rules of Appellate Procedure, the State submits this brief in response to new matters raised in cross-respondent's brief.

ARGUMENT

DEFENSE COUNSEL'S FAILURE TO MOVE FOR DISMISSAL AFTER THE STATE RESTED DID NOT UNDERMINE THE RELIABILITY OR FAIRNESS OF THE TRIAL

Holding of the Court of Appeals

Addressing defendant's claim of ineffective assistance of counsel, the Court of Appeals first held that a "necessary element" of the concealed weapons offense is proof that the defendant "did not have a valid permit to carry a concealed weapon." *State v. Smith*, 2003 UT App 52, ¶ 32, 65 P.3d 648. Because the State presented no such evidence in its case-in-chief, the Court concluded that defense counsel was deficient in not moving for dismissal after the State rested. *Id.* at ¶¶ 32-33. Turning to the prejudice prong of the

analysis, the Court "conclude[d] that "[h]ad trial counsel raised this lack of evidence, there is a reasonable probability that the trial court would have dismissed the concealed weapon charge." *Id.* at ¶ 34.

Defendant's Response to State's Claim on Certiorari

On certiorari, the State argues that contrary to the holding of the Court of Appeals, the lack of a permit is not an element of the concealed weapons offense and that counsel was not, therefore, constitutionally ineffective in failing to move for dismissal. Brf. of Cross-Pet. at 23-27.

In response, defendant argues:

> The State fails to acknowledge that the Court of Appeals based its finding on "both section 76-10-504(1)(b) and jury instruction #13D" . . . . Jury instruction #13D specifically required the State to prove that Smith lacked a valid concealed weapons permit in order to overcome the proof beyond a reasonable doubt standard. It is too late for the State to argue it was not required to give evidence that [he] lacked a valid concealed weapons permit when the jury instruction required it to do so.
>
> In summary, this Court can decide this issue in favor of [defendant] based solely on jury instruction #13D, since this instruction included as an element of the offense that [defendant] lacked a valid firearm permit. The State failed to prove this necessary element in its case in chief and defendant would have been entitled to a dismissal based on the insufficient evidence.

Def. Reply Brf. at 4, 6.

Distilled to its essence, defendant claims that notwithstanding the law, there is a reasonable probability that a motion for dismissal would have been granted because the instructions reflect that the trial was conducted under the assumption that the lack of a permit

is an element of the offense. Although this claim has some appeal at first glance, it fails under *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838 (1993).

Prejudice Under *Lockhart v. Fretwell*

Under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), a defendant must satisfy a two-part test to prevail on a claim of ineffective assistance of counsel. The defendant must show that: (1) "counsel's performance was deficient," and (2) "the deficient performance prejudiced the defense." *Id.* at 687, 104 S.Ct. at 2064. The prejudice prong of the *Strickland* test "requires [a] showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* As a general rule, prejudice can be established by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068.

Strickland's outcome-determinative test is sufficient to assess prejudice in most, but not all, ineffective-assistance-of-counsel claims. *Williams v. Taylor*, 529 U.S. 362, 391, 120 S.Ct. 1495, 1512 (2000). In some situations, the likelihood of a different outcome cannot be fairly characterized as legitimate prejudice. *Id.* at 391-92, 120 S.Ct. at 1512. In *Lockhart v. Fretwell*, the Supreme Court held that notwithstanding the likelihood of a different outcome, prejudice will *not* be found if the result in the case was "neither unfair nor unreliable," as judged under the law at the time of appellate review. *Fretwell*, 506 U.S. at 371-72, 113 S.Ct. at 843-44.

In *Fretwell*, the defendant was convicted of capital felony murder for a homicide committed in the course of a robbery. 506 U.S. at 366-67, 113 S.Ct. at 841. The jury sentenced Fretwell to death after finding that he committed the murder for pecuniary gain—a qualifying aggravator for the death sentence. *Id.* That sentence, however, was presumably unconstitutional under *Collins v. Lockhart*, 754 F.2d 258, 263-65 (8th Cir. 1985), which held that pecuniary gain may not be used as a death penalty aggravator in a felony-murder conviction based on robbery because it duplicates an element of the crime itself, in violation of the Eighth Amendment. On appeal, Fretwell claimed that his death sentence violated *Collins*, but the Arkansas Supreme Court declined to address the claim because it was not raised at sentencing. *Fretwell*, 506 U.S. at 367, 113 S.Ct. at 841. The Arkansas Supreme Court also denied Fretwell's application for post-judgment relief. *Id.*

Fretwell sought federal habeas relief, arguing that his counsel was ineffective in failing to make the *Collins* objection. *Id.* While the habeas petition was still pending, *Collins* was overruled in *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir. 1989). *Fretwell*, 506 U.S. at 367, 113 S.Ct. at 841. One year later and *Perry* notwithstanding, the federal district court vacated Fretwell's death sentence for ineffective assistance of counsel and the Eighth Circuit affirmed. *Id.* at 367-68, 113 S.Ct. at 841. Applying *Strickland's* outcome-determinative test, the Eighth Circuit reasoned that because *Collins* had not been overruled at the time of sentencing, there was a reasonable probability that but for defense counsel's failure to object, Fretwell would not have been sentenced to death. *Id.* at 368, 113 S.Ct. at 841-42. The United States Supreme Court reversed. *Id.*

The Supreme Court held that the Eighth Circuit's prejudice analysis was defective because it "focus[ed] solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable"—the "touchstone" of an ineffectiveness claim. *Id.* at 369-70, 113 S.Ct. at 842-43. The Court observed that "'the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.'" *Id.* at 369, 113 S.Ct. at 842 (quoting *United States v. Cronic*, 466 U.S. 648, 658, 104 S.Ct. 2039, 2046 (1984)). Accordingly, prejudice will not be found where it "grant[s] the defendant a windfall to which the law does not entitle him." *Id.* at 369-70, 113 S.Ct. at 842-43.

The Supreme Court concluded that even though *Collins* may have controlled at the time of sentencing and a different outcome was thus likely had counsel made a *Collins* objection, there was no prejudice because "the ineffectiveness of counsel d[id] not deprive the defendant of any substantive or procedural right . . . ." *Id.* at 372, 113 S.Ct. at 844. The Court explained that whereas counsel's performance is judged on the facts of the particular case, viewed as of the time of trial, prejudice is judged under the law existing at the time of appellate review. *Id.* at 371-72, 113 S.Ct. at 844. Where the *Collins* holding was no longer good law, Fretwell could not demonstrate that he was prejudiced by his counsel's failure to make a *Collins* objection—it did "not deprive [him] of any substantive or procedural right to which the law entitles him." *Id.* at 372, 113 S.Ct. at 844.

"*Lockhart* does not supplant the *Strickland* analysis." *Glover v. United States*, 531 U.S. 198, 203, 121 S.Ct. 696, 700 (2001). It merely "holds that in some circumstances a

mere difference in outcome will not suffice to establish prejudice." *Id.* at 202, 121 S.Ct. at 700. If the "likelihood of a different outcome [is] attributable to an incorrect interpretation of the law," prejudice will not be found. *Williams*, 529 U.S at 392, 120 S.Ct. at 1512.

In sum, an appellate court "may not consider [as prejudice] the effect of an objection it knows to be wholly meritless under current governing law, even if the objection might have been considered meritorious at the time of its omission." *Id.* at 374, 113 S.Ct. at 845 (O'Connor, J., concurring).

Defendant Has Not Established Prejudice Under *Lockhart v. Fretwell*

Assuming, based on the jury instructions, that the trial court would have ruled that the lack of a permit is an element of the offense, prejudice would be found under a strict outcome-determinative analysis. But for counsel's failure to move for dismissal after the State rested, there is a reasonable probability that the concealed weapons charge would have been dismissed by the trial court. This was the holding of the Court of Appeals. *Smith*, 2003 UT App 52, ¶¶ 32-34.

But, as explained in the State's opening brief, the lack of a permit is not an element of the concealed weapons offense. Brf. of Cross-Pet. at 23-27. Defendant argues that it matters not because, given the jury instructions, a motion to dismiss would have succeeded at *that* time. This, however, ignores the teaching of *Fretwell*. Where the lack of a permit is not an element of the offense, it cannot be said that defendant's conviction was either unfair or unreliable. *See id.* at 371, 113 S.Ct. at 843. Defendant "has no entitlement to the luck of a

[mistaken] decisionmaker." *Fretwell*, 506 U.S. at 370, 113 S.Ct. at 843 (quotations and citations omitted).

CONCLUSION

For the foregoing reasons and those stated in the State's opening brief, the State respectfully requests the Court to reverse the judgment of the court of appeals holding that defendant's trial counsel was constitutionally ineffective in not moving for dismissal after the State rested. *See Smith*, 2003 UT App 52, at ¶¶ 31-35, 37.

Respectfully submitted December 23, 2004.

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL

JEFFREY S. GRAY
Assistant Attorney General
Counsel for Cross-Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2004, I served two copies of the foregoing Reply Brief of Cross-Petitioner upon the defendant/cross-respondent, Norm Smith, by causing them to be delivered by first class mail to his counsel of record as follows:

Margaret P. Lindsay
99 East Center Street
PO BOX 1895
Orem, UT 84059-1895

Jeffrey S. Gray
Assistant Attorney General

F \Jgray\Smith, Norm\Smith Nor cert reply brf doc
12/23/2004 9 42 AM